Office-Supreme Court, U.S.
FILED
NOV 16 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-637

In the Supreme Court of the United States

OCTOBER TERM, 1983

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,
APPELLANT

v.

SELECTIVE SERVICE SYSTEM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

NEIL H. KOSLOWE
Special Litigation Counsel

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this appeal under 28 U.S.C. 1252.

2. Whether the district court properly dismissed appellant for lack of standing.

3. Whether the district court abused its discretion in denying appellant leave to file a second amended complaint.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes involved 2

Statement 2

Argument 7

A. The court of appeals correctly transferred the appeal to this Court under 28 U.S.C. 1252 7

B. The district court correctly concluded that appellant lacked standing 9

C. The district court did not abuse its discretion in denying appellant leave to file a second amended complaint 12

D. If this Court declines to affirm summarily, it should defer acting on the jurisdictional statement until it rules on the merits of the underlying action in *Selective Service System* v. *Minnesota Public Interest Group*, No. 83-276 13

Conclusion 15

TABLE OF AUTHORITIES

Cases:

Associated General Contractors v. *Otter Tail Power Co.*, 611 F.2d 684 ..... 10, 11

Beneficial Finance of Kansas, Inc. v. *United States*, dismissed as moot, No. 81-583 (Dec. 13, 1982) 14

Boyce v. *Rizzo*, 78 F.R.D. 698 10

Page

Cases—Continued:

California Bankers Ass'n v. *Shultz*, 416 U.S. 21 10

Doe v. *Bolton*, 410 U.S. 179 13

FHA v. *The Darlington, Inc.*, 352 U.S. 977 14

Harris v. *McRae*, 448 U.S. 297 11

Health Research Group v. *Kennedy*, 82 F.R.D. 21 10

Hunt v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333 ..... 3, 9, 10, 11

National Collegiate Athletic Association v. *Califano*, 622 F.2d 1382 11

Sierra Club v. *Morton*, 405 U.S. 727 9

Warth v. *Seldin*, 422 U.S. 490 ..... 9, 10

Williams v. *Zbaraz*, 448 U.S. 358 14

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 12

Constitution, statutes and rules:

U.S. Const. :

Art. III 10, 11

Amend. V 3

Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, § 1113, 96 Stat. 748 ..... 2, 3, 12, 13, 14

Page

Constitution, statutes and rules—Continued:

Higher Education Act of 1965, Title IV, 20 U.S.C. (& Supp. V) 1070 *et seq.* 2

Military Selective Service Act, 50 U.S.C. App. (Supp. V) 453 ..... 2, 3

Privacy Act of 1974, 5 U.S.C. 552a *et seq.* 14

28 U.S.C. 1252 ..... 2, 7, 8, 9, 13, 14

Fed. R. Civ. P. :

Rule 12(c) 3
Rule 54(b) 3, 8
Rule 23(a)(3) 10
Rule 23(a)(4) 10

Miscellaneous:

R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 8

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-637

MINNESOTA PUBLIC INTEREST RESEARCH GROUP,
APPELLANT

v.

SELECTIVE SERVICE SYSTEM, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

MOTION TO AFFIRM

The Solicitor General, on behalf of the Selective Service System, *et al.*, moves under Rule 16.1 of the Rules of this Court that the decision of the district court be affirmed.

OPINIONS BELOW

The opinion of the district court dismissing appellant for lack of standing (J.S. App. 1a-20a) is reported at 557 F. Supp. 925. The opinion of the district court denying appellant's motion for reconsideration (J.S. App. 21a-24a) is not reported. The order of the court of appeals dismissing appellant's appeal for lack of jurisdiction and transferring the appeal to this Court (J.S. App. 27a-28a) is not reported.

JURISDICTION

The judgment of the district court was entered on January 24, 1983. A motion for reconsideration was denied (J.S. App. 21a-24a) on March 16, 1983. A notice of appeal to the court of appeals (J.S. App. 25a-26a) was filed on May 13,

1983. The order of the court of appeals dismissing the appeal for lack of jurisdiction and transferring it to this Court (J.S. App. 27a-28a) was entered on August 17, 1983. On September 19, 1983, Justice Blackmun granted appellant until October 3, 1983, to file a jurisdictional statement. The appeal was docketed as of September 30, 1983. This Court has jurisdiction under 28 U.S.C. 1252.

STATUTE INVOLVED

28 U.S.C. 1252 provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

STATEMENT

1. On November 23, 1982, appellant, a "college student-directed, non-profit Minnesota Corporation" (Complaint 3), filed this action to enjoin the operation of Section 1113 of the Department of Defense Authorization Act of 1983, Pub. L. No. 97-252, 96 Stat. 748. Section 1113 renders ineligible for aid under Title IV of the Higher Education Act of 1965 (20 U.S.C. (& Supp. V) 1070 *et seq.*) any person who fails to register as required by the Military Selective Service

Act, 50 U.S.C. App. (Supp. V) 453. It also requires applicants for aid to file with their schools a statement of compliance with the Selective Service Act. Appellant contended that Section 1113 is a bill of attainder and violates the Fifth Amendment. Appellees moved for judgment on the pleadings, arguing that appellant lacked standing.

Appellant was granted leave to amend its complaint. The amendment added allegations that appellant's membership included males, subject to the registration requirement of the Selective Service Act, who would be denied financial aid under the Higher Education Act unless enforcement of Section 1113 were enjoined (Amended Complaint paras. 14-15). The district court also granted leave to three anonymous students (John Doe, *et al.*) to intervene as plaintiffs. *MPIRG* v. *Selective Service System*, 557 F. Supp. 923 (D. Minn. 1983).

2. Pursuant to Fed R. Civ. P. 12(c) the district court treated the government's motion as one for summary judgment, and on January 24, 1983, dismissed appellant from the action for lack of standing (J.S. App. 1a-20a). The court directed the immediate entry of final judgment against appellant (J.S. App. 17a-18a). See Fed. R. Civ. P. 54(b). The court ruled that the John Doe intervenors had standing, however, and the action proceeded in their names (J.S. App. 17a-18a).[1]

In deciding that appellant had no standing to sue as a representative of its members the district court applied the test announced by this Court in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).[2]

---

[1]On January 26, 1983, three anonymous students represented by appellant as counsel (Bradley Boe, *et al.*) filed a separate action making essentially the same allegations as the John Doe intervenors. The two actions were informally consolidated by the district court.

[2]Appellant did not allege that it had standing to sue in its own right (J.S. App. 9a).

Under that test an association has standing to sue on behalf of its members if (1) the members would have standing to sue in their own right, (2) the interests the association seeks to protect are germane to its purposes, and (3) neither the claim asserted nor the relief requested requires the participation of individual members. The court concluded that appellant had failed to show that the interests it sought to protect were germane to its purposes, or that the participation of individual members was not required (J.S. App. 13a-17a).

In deciding the question of germaneness, the court examined appellant's original complaint, amended complaint, supporting affidavits, legal memoranda, oral argument, and extra-record correspondence to the court, and found that appellant's purpose was " 'to promote the public interest and social welfare' " (J.S. App. 11a, 13a). The court said this "very broad mandate" showed that appellant was "concerned like any other public interest group with issues that affect its members, most of whom are students, as citizens" rather than simply with "issues that affect students as students" (*id.* at 13a; footnote omitted). Although the court assumed that appellant sought to protect an "interest in availability of financial aid without allegedly unconstitutional restrictions," it found "nowhere in plaintiff's complaint, amended complaint, oral argument, or even its briefs and letter to the court any explanation of how the interests it seeks to protect * * * are germane to its broad public interest purpose" (*id.* at 14a). Rather, the court concluded, appellant was attempting " 'to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government' " (*ibid.*).

With respect to the question of individual participation, the district court noted that "[m]embership in MPIRG [was] never defined" by appellant, although it appeared that some 40,000 students had paid fees to the group (J.S.

App. 13a n.31). The court found that "the status and interests of the [student] members are diverse," and "[t]heir only common tie is that they are students" (*id.* at 17a). The court noted that "[s]tudents, like other segments of the population, may have diverse views on the propriety of linking financial aid to draft registration," and that "MPIRG concedes this diversity exists" (*ibid.*; footnote omitted). "Some of the members may not want financial aid; others may not qualify for it even absent the challenged provisions. Many of the members, for example men outside the registration age bracket or women, are not subject to the provision; others may be subject to the registration requirements but may still support the provision" (*ibid.*). Also, "some members will not be harmed by experiencing either denial of financial assistance or burdens on their fifth amendment rights" (*ibid.*). Accordingly, the court ruled, "MPIRG is clearly not in a position to speak for its members on this issue" (*ibid.*).

3. On February 1, 1983, appellant moved for reconsideration of the district court's order of dismissal, and for leave to file a second amended complaint. The court denied the motion on March 16, 1983 (J.S. App. 21a-24a).

The court stressed that it had "afforded to the plaintiff every opportunity to present to the court any and all information it deemed appropriate to the issue of standing prior to the resolution of the issue by the court" (J.S. App. 23a-24a). It had "allowed plaintiff to supply further particularized allegations of fact in support of plaintiff's standing by granting plaintiff leave to amend its complaint"; it had "accepted as true all material allegations of the amended complaint and construed the amended complaint in plaintiff's favor"; it had "considered the affidavit of E. Gail Suchman dated December 10, 1982, the factual representations on MPIRG's standing made in MPIRG's 'response in opposition to defendants' motion for judgment on the

pleadings,' and plaintiff's 'reply to defendants' opposition to plaintiff's motion for a preliminary injunction' "; and it had "considered factual representations made by MPIRG's counsel during oral argument on January 10, 1983 and factual representations concerning [appellant's] standing contained in a letter dated January 13, 1983 from MPIRG's counsel" (*id.* at 23a). The additional material which appellant sought to present on reconsideration was "available to plaintiff's counsel before this action was commenced, before its motion for leave to file an amended complaint, and before this court's order of January 24, 1983" (*ibid.*).

The court concluded that appellant was in fact attempting "to reopen the entire record and present the matter to the court on entirely new and different facts" (J.S. App. 23a). Since it had already granted appellant leave to amend its complaint "for the precise purpose of addressing the issue of standing," the court held that "[t]he issue of standing should not now be litigated by this or any other court on the basis of a new record consisting of the additional materials now offered" (*id.* at 24a).

4. Appellant filed a notice of appeal to the Eighth Circuit on May 13, 1983 (J.S. App. 25a-26a). On June 16, 1983, before any briefs were filed in the court of appeals, the district court issued final judgments in the underlying action prosecuted by the intervening plaintiffs and the companion action prosecuted by the Bradley Boe plaintiffs (83-276 J.S. App. 38a-41a). The court held Section 1113 unconstitutional and enjoined its enforcement (83-276 J.S. App. 31a-37a). The next day the government moved in both actions for a stay pending direct appeal to this Court.[3] The government filed notices of appeal on June 21, 1983, and June 27, 1983 (83-276 J.S. App. 42a-45a).

---

[3]The district court denied a stay, but this Court granted a stay on June 29, 1983.

Though it was aware that the government was appealing the district court's final decision in this action directly to this Court, appellant on June 24, 1983 filed a brief on the standing issue in the court of appeals. On July 19, 1983, the government moved in the Eighth Circuit to dismiss the appeal in that court for lack of jurisdiction, arguing that under 28 U.S.C. 1252 the appeal should be deemed taken directly to this Court.

On August 17, 1983, the court of appeals granted the government's motion and transferred the appeal to this Court (J.S. App. 27a-28a). It ruled that since the district court had held Section 1113 unconstitutional in the underlying action, and since the government had appealed directly to this Court, this Court had "exclusive jurisdiction" of the appeal under 28 U.S.C. 1252 (J.S. App. 28a).

ARGUMENT

Notwithstanding the explicit language of 28 U.S.C. 1252 appellant contends that the court of appeals, and not this Court, has jurisdiction over its appeal. Appellant also argues that the district court misapplied settled principles of standing law, and abused its discretion in refusing to permit appellant to amend its complaint a second time. These contentions are without merit.

A. The Court Of Appeals Correctly Transferred The Appeal To This Court Under 28 U.S.C. 1252

Whenever notice of direct appeal to the Supreme Court is filed under 28 U.S.C. 1252, "[a]ll appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court." This unambiguous language means what it says. "Any prior appeal already lodged in a court of appeals, whatever the issue, is to be transferred to the [Supreme] Court upon the filing and

service of a notice of appeal under § 1252." R. Stern & E. Gressman, *Supreme Court Practice* 79 (5th ed. 1978). The purpose of this provision is "to avoid splitting the case or the issues as between the [Supreme] Court and the lower appellate court" (*ibid.*).

The Eighth Circuit thus correctly transferred appellant's appeal to this Court. Although appellant was dismissed for lack of standing, the underlying action was prosecuted to a conclusion by the remaining intervening plaintiffs.[4] When the government filed notice of direct appeal in the underlying action under 28 U.S.C. 1252, the court of appeals was bound to transfer to this Court the prior appeal lodged there by appellant.[5]

---

[4]Appellant appears to suggest (J.S. 5-6) that the last sentence of 28 U.S.C. 1252 does not apply to appeals taken from dismissals under Fed. R. Civ. P. 54(b) (Judgment Upon Multiple Claims or Involving Multiple Parties). It is difficult to see why that should be so. The language of that sentence certainly encompasses Rule 54(b) appeals. It says that "*[a]ll* appeals * * * taken to other courts *prior to* * * * notice [of appeal under this Section] shall be treated as taken directly to the Supreme Court" (emphasis added). Moreover, the policy of Section 1252 against splitting cases between appellate courts can be as relevant to Rule 54(b) appeals as to others. For example, if the standing of the individual plaintiffs were an issue in this Court, it would be economical to consider appellant's standing together with that question—both because the standing issues would have much in common, and because it might be possible to reach the merits only in appellant's case. It is true, as we note below (pages 13-14), that the Rule 54(b) appeal will not always be so intertwined with the main case. But the same is true of many issues (*e.g.*, denial of class certification, award of attorney's fees) not necessarily appealable under Rule 54(b), but that are brought to this Court along with the constitutional question under Section 1252.

[5]Appellant complains that this result was achieved by "[a]ctions manipulated" by the government which have imposed on appellant the "duplicative and expensive effort" of preparing both a brief in the Eighth Circuit and a jurisdictional statement for this Court (J.S. 2-3 n.1, 6). But it was appellant who sought reconsideration of the district court's January 24, 1983 order of dismissal, rather than prosecuting an immediate appeal. Appellant then waited more than two weeks after it

B. The District Court Correctly Concluded That Appellant Lacked Standing

The doctrine of "representational" or "associational" standing is a very limited exception to the fundamental Article III requirement that the plaintiff before a federal court "be himself among the injured." *Sierra Club* v. *Morton,* 405 U.S. 727, 735 (1972). It allows organizations such as appellant, who have themselves suffered no injury, to seek relief as representatives of their members. To satisfy the requirements of Article III, the members must be shown to have suffered injury sufficient to give them standing to sue in their own right. *Warth* v. *Seldin,* 422 U.S. 490, 511 (1975). But that requirement, taken alone, would confer standing on any association that presented any justiciable claim that any of its members wished to litigate. Accordingly, this Court has also demanded that there be a substantial link between the nature of the claim presented, the purposes of the organization, and the interests of the members. As this Court stated in *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U.S. at 343, a representative plaintiff must establish that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Appellant has failed to satisfy this test.

---

was served with the district court's order denying reconsideration to file notice of appeal (J.S. App. 25a-26a). See J.S. 3 n.2. And appellant did not file its brief in the Eighth Circuit until after the district court had issued a final decision in the underlying action, when the government had already filed notice of appeal in the consolidated (Bradley Boe) action under 28 U.S.C. 1252.

1. *Germaneness.* In its amended complaint appellant said only that it is a "college student-directed, non-profit Minnesota Corporation qualified to do business in the State of Minnesota since February 13, 1971," and that "[f]or the 1981-82 school year, the number of students on ten campuses in Minnesota paying MPIRG fees totalled approximately 42,217" (Amended Complaint paras. 3, 8). In supplemental oral and written submissions to the district court appellant added only that its purpose is " 'to promote the public interest and social welfare' " (J.S. 18).

The district court was clearly correct in holding that the facts alleged by appellant fail to satisfy *Hunt*'s requirement that "the interests it seeks to protect [must be] germane to the organization's purpose" (432 U.S. at 343). Unlike *Hunt*'s first requirement (a showing of injury to association members), which incorporates the Article III prerequisite of injury-in-fact, the insistence on a showing of germaneness is addressed to the prudential issue of whether the association asserting no injury to itself will be an adequate representative of its members. Cf. *Warth* v. *Seldin*, 422 U.S. at 514; *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 51-52 (1974); Fed. R. Civ. P. 23(a)(3), (4). "A local PTA, for example, cannot be expected to represent its members in matters not relating to education." *Boyce* v. *Rizzo*, 78 F.R.D. 698, 704 (E.D. Pa. 1978). This largely factual question is one the district court is best able to determine. Its decision here is consistent with those of other courts in similar cases and does not warrant plenary review. See, *e.g.*, *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d 684, 690-691 (8th Cir. 1979); *Health Research Group* v. *Kennedy*, 82 F.R.D. 21, 28 (D.D.C. 1979)

(germaneness not satisfied in the case of "an organization with the broadest of concerns: the public interest").[6]

2. *Individual participation. Hunt* also requires that an association such as appellant show that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. at 343. Like the issue of germaneness, this factor too is relevant not to Article III's jurisdictional prerequisites but to the adequacy with which an association is likely to represent its members' interests. *National Collegiate Athletic Association* v. *Califano*, 622 F.2d 1382, 1391-1392 (10th Cir. 1980). For example, where the existence of injury or the amount of damages is in question, problems of proof and adequacy of relief may necessitate individual participation. So too, a great diversity of opinion among an association's members may raise concerns about the vigor of its advocacy or the specter of a change in position. Allowing litigation to go forward in the face of such problems can result in wasting the resources of the judiciary and the opposing party, and frustrating the legitimate claims of the plaintiff's members. See, *e.g.*, *Harris* v. *McRae*, 448 U.S. 297, 321 (1980) (citation omitted) (" 'diversity of view within' " the membership of Women's Division); *National Collegiate Athletic Association* v. *Califano*, 622 F.2d at 1392; *Associated General Contractors* v. *Otter Tail Power Co.*, 611 F.2d at 691.

---

[6]Appellant now contends that it has a specific institutional interest in the availability of student financial aid and in protecting the constitutional rights of students (J.S. 19-20). But appellant made no allegation below that one of its purposes was to protect the availability of financial aid to its student members, and the only basis for that contention here is its assertion that it has a full-time staff economist (J.S. 20). Appellant's contention that it is interested in protecting its members' constitutional rights is no less broad than its asserted purpose of promoting "the public interest and social welfare."

Notwithstanding appellant's current protestations about a lack of proof (J.S. 11), it conceded in the district court that "there is a diversity of view among its members" (J.S. App. 15a, 17a). Indeed, as the court noted, "97.56 percent of all persons required to register in Minnesota have done so" (*id.* at 14a). Among applicants for aid, it is in the financial interest of all but the few nonregistrants to defend the validity of Section 1113, since the amount of aid available under the Higher Education Act is limited and funds are allocated to students in order of need (J.S. App. 15a, 17a). There is no reason for plenary review of the district court's largely factual conclusion that appellant, in these circumstances, should not be permitted to litigate on behalf of its members claims that the affected individuals can bring on their own.

C. The District Court Did Not Abuse Its Discretion In Denying Appellant Leave To File A Second Amended Complaint

The district court acted well within its discretion in denying appellant leave to file a second amended complaint. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-333 (1971). Appellant was afforded no fewer than six opportunities — including a first amended complaint —to clarify for the court the facts relevant to its standing (J.S. App. 23a-24a). The court properly ruled that this action had to be terminated at some point.

Moreover, appellant has suffered no substantial prejudice as a result of the district court's ruling. The intervening John Doe plaintiffs, who continued the underlying action, adopted in their preliminary injunction and summary judgment motions the brief appellant filed before it was dismissed. Appellant itself represents as counsel the Bradley

Boe plaintiffs in the companion action now before this Court (No. 83-276).

D. If This Court Declines To Affirm Summarily, It Should Defer Acting On The Jurisdictional Statement Until It Rules On The Merits Of The Underlying Action In Selective Service System v. Minnesota Public Interest Group, No. 83-276

As we made clear above, appellant's appeal was properly transferred to this Court pursuant to paragraph two of 28 U.S.C. 1252. That section does not state, however, nor is it inevitable, that this appeal must be decided simultaneously with the government's appeal from the district court's holding that Section 1113 is unconstitutional. In this case a decision on the constitutional issues does not depend in any way on a resolution of appellant's standing to litigate the identical issues. The government does not dispute that the individual plaintiffs (appellees in No. 83-276) have standing to carry forward the underlying action. See, *e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 189 (1973) ("we need not pass upon the status of these additional appellants in this suit, for the issues are sufficiently and adequately presented by Doe and the physician-applicants"). The intervening John Doe plaintiffs have not only raised the very issues in which appellant asserts an interest, but in the district court incorporated appellant's brief by reference. Appellant itself represents the Bradley Boe plaintiffs as counsel in this Court in No. 83-276.

Not only is appellant's participation unnecessary to a decision of the underlying constitutional issues, but this Court's determination of those issues could well render moot the question of appellant's standing to sue. If this Court should conclude in No. 83-276 that Section 1113 is unconstitutional, the statute will fall and appellant's claim

that it is invalid will be moot. See *Beneficial Finance of Kansas, Inc.* v. *United States*, dismissed as moot, No. 81-583 (Dec. 13, 1982). In that event the issue of appellant's standing to litigate the validity of Section 1113 will also be moot.

Appellant's constitutional claims will also be moot if the Court concludes that Section 1113 is constitutional.[7] In that case, however, appellant may still want a determination of its standing to pursue the statutory issue left undecided by the district court (see 83-276 J.S. App. 33a).[8] We believe that 28 U.S.C. 1252 would not require the Court to decide this ancillary issue in that eventuality. Cf. *Williams* v. *Zbaraz*, 448 U.S. 358, 368 (1980); *FHA* v. *The Darlington, Inc.*, 352 U.S. 977 (1957). Instead, the appropriate disposition of this appeal would then be to vacate the order of the court of appeals transferring the case to this Court, and permit the court of appeals to determine whether appellants have standing, or otherwise to make an appropriate disposition of the case.

---

[7]The fact that the issue of appellant's standing is likely to be moot whatever the outcome of this appeal not only speaks against the need for immediate plenary consideration, but also illustrates the correctness of the district court's conclusion that this is a weak case for representational standing.

[8]In addition to its constitutional claims, appellant asserted in the district court that Section 1113 violated the Privacy Act of 1974, 5 U.S.C. 552a *et seq.* (Amended Complaint para. 13).

CONCLUSION

The judgment of the district court should be summarily affirmed. Alternatively, the Court may wish to defer consideration of the jurisdictional statement until after it decides the underlying constitutional issues in *Selective Service System* v. *Minnesota Public Interest Research Group*, No. 83-276, and then to dispose of the appeal as appropriate in light of that decision.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

NEIL H. KOSLOWE
Special Litigation Counsel

NOVEMBER 1983

DOJ-1983-11